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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of:

Application of BellSouth Corp.; BellSouth Telecommunications, Inc.; and BellSouth Long Distance, Inc. for Authorization To Provide InterLATA Services In the State of South Carolina	))))	**CC Dkt. No. 97-208**

To: The Commission

Reply of Ad Hoc Coalition of Telecommunications Manufacturing Companies and Corporate Telecommunications Service Managers[1]

We express no view about whether BellSouth has complied with two of the three showings necessary to grant its application to provide interLATA service (the competitive checklist and separate subsidiary requirements), but we show below that there is no merit to either argument commenters make in an effort to prove that BellSouth has failed to comply with the third showing. That showing requires a demonstration that grant of the application will serve the public interest. Some commenters contend that a grant would be contrary to the public interest because it would not promote competition in South Carolina's interLATA service market. Others argue that a grant would be inconsistent with the public interest because BellSouth has not opened its exchange market to competition in ways that go beyond those mandated by the competitive checklist. We show below why both arguments should be rejected.

1/ The coalition submitting this Reply consists of each of the 20 parties listed on Att. 1 of the Coalition's opening comments except for American Pipe & Plastics, Inc.

[redacted]

I. The Argument that BellSouth's Provision of InterLATA Service Would Not Increase Competition In the InterLATA Service Market Must Be Rejected Since Accepting the Argument Would Reverse FCC Policy Without Complying with the Administrative Procedure Act and Since the Argument is Based on Erroneous Assumptions

Although the question of whether BellSouth's provision of interLATA service promotes interLATA competition is relevant to the issue of whether granting the application will serve the public interest, those who conclude that BellSouth's market entry will not promote such competition do so based on unsustainable claims.[2/] Below, we discuss each claim and show why it should be rejected.

First, the FCC cannot lawfully accept the claim that BellSouth's provision of interLATA service will harm interLATA competition based on the theory that existing regulatory safeguards will not prevent the company from unlawfully extending its exchange market power to the interLATA market[3/] since accepting that theory would effectively reverse existing regulatory policy without complying with the notice and comment procedures mandated by Section 553(b) of the Administrative Procedure Act ("APA").[4/] Section 553(b) requires the agency to apprise interested parties of the issues involved in a proceeding and give them a reasonable opportunity to participate.[5/] It also requires any new policy adopted in the proceeding to be a "logical out-

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2/ Ad Hoc Coalition Comments at 3-35.

3/ AT&T Comments at 67-71; MCI Comments at 92-99; Sprint Comments at 57-64; WorldCom Comments at 24-26.

4/ 5 U.S.C.A. § 553(b) (1996).

5/ Tindal v. Block, 717 F.2d 874, 885 (4th Cir., 1983) (citations omitted), cert. denied, 465 U.S. 1080 (1984); St. James Hospital v. Heckler, 579 F. Supp. 757, 763 (N.D. Ill. 1984), aff'd 760 F.2d 1460 (7th Cir), cert. denied, 474 U.S. 902 (1985).

growth" of the one proposed.[6/] Basing the public interest determination in this case on the absence of regulatory safeguards to protect incumbent interLATA service providers from predation by BellSouth plainly would reverse the Commission's policy that safeguards are sufficient to protect interLATA competition from such predation.[7/] Moreover, it would reverse that policy in violation of Section 533(b) because, while the FCC issued a public notice inviting interested parties to comment on BellSouth's application, nowhere did that notice inform interested parties that a logical outgrowth of this proceeding might be reversal of this agency policy.[8/]

6/ Shell Oil Co. v. EPA, 950 F.2d 741, 747 (D.C. Cir. 1991); Aeronautical Radio, Inc. v. FCC, 928 F.2d 428, 445-46 (D.C. Cir. 1991).

7/ Just this past summer, the FCC found that its existing safeguards will prevent leveraging of a Bell company's exchange market power into the interexchange market. Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Second Report and Order, supra, at ¶¶ 104 (safeguards will prevent improper cost allocation); id. at ¶ 119 (safeguards will prevent unfair discrimination against interLATA service competitors); id. at ¶ 126 (price cap regulation will prevent price increases above competitive levels); Access Charge Reform, Report and Order at ¶ 278 (FCC 97-158, rel. May 16, 1997) ("we have in place adequate safeguards against" the exercise of a price squeeze by a Bell Company against its interexchange competitors). In making these findings, the Commission was reiterating its longstanding policy that its regulatory safeguards will prevent such predation. Thus, in 1982 it concluded that prohibiting Bell companies from providing interLATA service is both "unnecessary and unwise." See Brief of the Federal Communications commission as an Amicus Curiae at 30, filed in U.S. West v. West. Elec. Co., No. 82-0192 (D.D. C. April 22, 1982). It reaffirmed this finding in 1987, noting that "the record three years after divestiture now establishes that there is little likelihood of competitive harm from BOC entry into most of the markets proscribed by the decree." Comments of the Federal Communications Commission as Amicus Curiae at 7, filed in U.S. v. West. Elec. Co., No. 82-0192 (D.D.C. March 13, 1987). It effectively reaffirmed this holding in early 1996 as well by dismissing as moot a petition which had requested the establishment of additional safeguards. Pet. for Rulemaking, 11 FCC Rcd. 4099 (1996).

8/ See, e.g., Ford Motor Co. v. FTC, 673 F.2d 1008 (9th Cir. 1981), cert. denied, 459 U.S. 999, 1009-10, 103 S. Ct. 358, 74 L.Ed.2d 394 (1984) (FTC abused its discretion in using adjudication rather than rule making procedures to announce new national interpretation of UCC provision that reversed long-standing policies and was widely applicable); see also, Montgomery Ward v. FTC, 691 F.2d 1322, 1328 (9th Cir. 1982) (rejecting in part FTC's attempt to impose new warranty requirements on Montgomery Ward because it had no notice of the new requirements, which substantially altered long-standing rules). The Commission could not lawfully find that a grant of BellSouth's application would be inconsistent with the public interest based on an
(Cont'd on next page)

Nor have commenters proved their claim that existing safeguards will be ineffective to protect interLATA competition from BellSouth predation, even if effective to protect against predation by other ILECs, due to BellSouth's unique untrustworthiness. Rather than show that BellSouth is uniquely untrustworthy in its compliance with regulatory safeguards, each example of BellSouth conduct referred to by commenters instead appears to be a situation where BellSouth has merely disagreed with the commenter about whether specific conduct is lawful.[9/]

The claim that BellSouth's involvement in the interLATA service market will produce no procompetitive effect because the market already is substantially competitive[10/] must be rejected because it too would effectively reverse existing FCC policy without following the APA's notice and comment procedures set forth above. While the FCC has held that parts of the interLATA market are substantially competitive, it also has found that it is unclear whether such competition

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absence of safeguards even if it had not previously concluded that existing safeguards were adequate since it was invited on numerous occasions in the past 15 years to adopt such safeguards but declined to do so. See Ad Hoc Coalition Comments at 38-39.

9/ See MCI Comments at 85, AT&T Comments at 69-70 (complaining that BellSouth's decision to petition for court review of FCC orders shows that it is untrustworthy even though the basis of each petition is BellSouth's contention that the subject FCC order is unlawful); Vanguard Comments at 23-24, ALTS Comments at 30-34 (complaining that BellSouth has not provided compensation to CLECs for terminating ISP traffic even though the question of whether CLECs are entitled to compensation in this circumstance is a legal question which is presently before the Commission for ruling); Independent Payphone Provider Comments at 9-17 (complaining that BellSouth has violated certain requirements applicable to payphone owners even though the issue of whether the company's conduct violates these requirements involves legal questions on which the FCC has not yet ruled); Sprint Comments at 54 (complaining about certain ILEC advertising while admitting that it is unclear whether this advertising is unlawful); MCI Comments at 84 (complaining about certain BellSouth marketing practices that have not been declared unlawful); AT&T at 70-71 (complaining about the large size of certain BellSouth exchange calling areas without alleging unlawful conduct in establishing these areas); and Vanguard at 20-23 (complaining about BellSouth actions in connection with its Memory Call Service offering more than six years ago and claiming falsely that FCC had held those actions unlawful).

10/ AT&T Comments at 74; MCI Comments at 87-88.

exists in the provision of residential interLATA service, a significant part of the interLATA market as a whole,[11/] and it has adopted a number of regulatory requirements based on this finding. For example, because the agency is unsure whether the residential interLATA market is competitive, it has ordered AT&T to reduce the price of residential toll service for certain residential customers to reflect decreases in AT&T's access costs.[12/] For the same reason, it has ordered AT&T to employ special tariffing procedures when proposing to significantly change the interstate telephone service rates of residential customers.[13/] At no time did the Commission notify interested parties that a logical outgrowth of the present proceeding might be reversal of the core finding that underlies these regulatory requirements.

11/ Policy and Rules Concerning the Interstate, Interexchange Marketplace, Second Report and Order at ¶¶ 123-25 (FCC 96-424, rel. Oct. 31, 1996). See also Policy and Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, 11 FCC Rcd. 7141, 7183 (1996) (residential interLATA services may be subject to tacit price coordination); Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, 11 FCC Rcd. 3271, 3314 (1995) (price coordination among interLATA service competitors may exist in the provision of interLATA service to residential customers). See also Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Second Report and Order at ¶ 92 (CC Dkt. No. 96-149, rel. April 18, 1997) (Bell company provision of interLATA service should "increase price competition and lead to innovative new services and marketing efficiencies"). Congressional leaders who wrote Section 271 made plain in Congressional floor debate that they too are unconvinced that the interLATA market as a whole is fully competitive. See, e.g., 141 Cong. Rec. S7906 (daily ed. June 7, 1995) ("Currently . . . [an] ologopol[y] or, at best, limited competition exist[s] in . . . long distance") (statement of Sen. Lott); 141 Cong. Rec. H8463 (daily ed. Aug. 4, 1995) (Today, "there is no competition in the long distance market") (statement of Rep. Dingell).

12/ See Statement of Chairman Reed E. Hundt, Rept. No. 97-22 (Nov. 7, 1997) describing the FCC's May 1997 access charge rules as "providing a guarantee that long distance prices will fall, and specifically that basic schedule customers will see their first general price decrease since 1989").

13/ Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, supra, 11 FCC Rcd. at 3317-18, 3357.

AT&T's claim that the Connecticut experience shows that BellSouth's provision of interLATA service will not cause interLATA service price reductions in South Carolina fails because it misrepresents the Connecticut experience.[14/] Even if SNET's interLATA service rates were no lower than those of its competitors as AT&T alleges -- an assertion that BellSouth seeks to disprove in its application -- AT&T itself aggressively markets a rate plan to Connecticut residences containing prices that are considerably lower than the least expensive rate plan that it aggressively markets to prospective residential customers elsewhere.[15/] The fact that SNET competes with AT&T in the interLATA service market is AT&T's only conceivable motive for providing this price discount in Connecticut, and it evidences that BellSouth's provision of interLATA service in South Carolina is likely to produce similar competitive benefits for people in that state.

II. It Would Be Unlawful for the FCC to Conclude that a Grant of the Application Is Contrary to the Public Interest Merely Because BellSouth's Exchange Market Has Not Been Opened to Competition In Ways that Go Beyond Those Mandated by the Statutory Checklist

Recognizing that Sections 2(b) and 271(d)(4) of the Act prohibit the FCC from mandating exchange market opening measures not required by the checklist in the absence of an unambiguous grant of authority,[16/] a few commenters seek to persuade the agency that legislative history or statutory language provides the necessary unambiguous authority. But their evidence is unpersuasive.

14/ AT&T Comments at 79. See also MCI Comments at 88-89; Sprint Comments at 55-56; Justice Department Comments at 48-49.

15/ See Ad Hoc Coalition Comments at 10-11.

16/ Id. at 24-35.

First, AT&T and Sprint claim that the required authority is found in the Senate's rejection of an amendment providing that "[f]ull implementation of the checklist . . . shall be deemed in full satisfaction of the public interest."[17/] In fact, rather than constituting unambiguous authority to extend the competitive checklist, rejection of this amendment merely confirms what is made clear elsewhere in the legislative history -- that Congress expects the FCC to determine the public interest based on whether the applicant's provision of interLATA service will stimulate competition in the interLATA service and telecommunications manufacturing markets.

Similarly, MCI wrongly claims that the fact that the 1996 Act as a whole is designed to open "all telecommunications markets to competition" constitutes a grant of power to mandate exchange market opening measures beyond those set forth in the checklist.[18/] While it is true that the Act as a whole is designed to open all telecommunications markets, each discrete section of the Act serves more limited purposes. Section 271(c)(2)(B)'s competitive checklist, for example, defines the FCC's authority to open the exchange market to competition, whereas Section 271(d)(3)(C)'s authority to determine whether grant of an application is in the public interest gives the agency power to ensure that a Bell company's involvement in interLATA service will promote competition in that market as well as in telecommunications manufacturing.

The Justice Department's claim that the language of Section 271(d)(2)(A) authorizes the FCC to extend the checklist in whatever manner the Department desires by requiring the Commission to give "substantial weight" to the Department's views[19/] fails as well. While that provi-

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17/ AT&T Comments at 73; Sprint Comments at 50-51.

18/ MCI Comments at 78.

19/ Justice Department Comments at 44-45.

sion requires the FCC to give substantial weight to the Department's views if the Department proposes that the FCC act in a manner that is consistent with the authority delegated by other statutes, it certainly does not empower the Department to expand the scope of the FCC's authority in whatever manner the Department may think is desirable.

Since Congress gave the FCC no power to extend the checklist, evidence designed to show that exchange competition will not develop rapidly without checklist extension should be rejected as irrelevant. Thus, the Commission should reject evidence designed to show that exchange competition is not likely without first requiring BellSouth to (i) lose a substantial share of the exchange market,[20/] (ii) lower its interstate access charges,[21/] share more universal service subsidies with CLECs,[22/] (iii) preempt the methodology used by the South Carolina Commission to regulate the price of UNEs and interconnection arrangements,[23/] (iv) permit CLECs to take advantage of the FCC's former "pick-and-choose" rule or its former "UNE rebundling" rule even though both rules have been invalidated by the Eighth Circuit as inconsistent with the checklist.[24/] or (v) prove that its exchange market is "fully and irreversibly" open to competition.[25/] None of those showings is required by the checklist. The Commission likewise should dismiss evidence designed to show that exchange competition is not likely without first requiring that BellSouth provide services and facilities to CLECs which enable CLECs to compete in a manner

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20/ Telecommunications Resellers Comments at 37-38.

21/ WorldCom Comments at 24-25; Sprint Comments at 62-64.

22/ WorldCom Comments. at 25-26.

23/ Justice Department Comments at 35-44.

24/ AT&T Comments at 61-62; MCI Comments at 80-83; WorldCom Comments at 26; ALTS Comments at 34-36.

25/ Justice Department Comments at 31.

they believe is "efficient",[26/] or that guarantees they "will remain viable",[27/] or that provides the FCC with a "high degree of certainty" that all methods of competition are "truly available".[28/] None of these open-ended exchange market opening measures is required by the checklist.

CONCLUSION

The FCC should find that a grant of BellSouth's application will serve the public interest.

Respectfully submitted,

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26/ AT&T Comments at 64.

27/ MCI Comments at 79.

28/ WorldCom Comments at 23.

Certificate of Service

I certify that on this 14th day of November, 1997 I served by First Class Mail a copy of the foregoing Reply of Ad Hoc Coalition of Telecommunications Manufacturing Companies and Corporate Telecommunications Service Managers to the parties at the following addresses:

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